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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CHRISTIAN A., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

EDGAR J.,

Defendant and Appellant.

D052715

(Super. Ct. No. NJ13483)

APPEAL from a judgment of the Superior Court of San Diego County, Michael J. Imhoff, Commissioner. Affirmed.

Edgar J. appeals the judgment terminating his parental rights over his son Christian A. Edgar contends the juvenile court violated his due process rights by failing

to provide him notice as required by Welfare and Institutions Code¹ section 316.2, subdivision (b) and California Rules of Court, rule 5.635(g);² abused its discretion by denying his section 388 petitions; erred by declining to apply the beneficial relationship exception to termination (§ 366.26, subd. (c)(1)(B)(i)); and failed to comply with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We affirm.

BACKGROUND

Christian was born in October 2006 to Norma Z. He tested positive for methamphetamine at birth. Norma admitted she used drugs during pregnancy and had little prenatal care. Accordingly, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition and Christian was detained in foster care. In late November he was moved to the home of maternal relatives where he remains. The relatives wish to adopt him.

Norma initially identified Leonardo V. as Christian's father. Two days after Christian's birth, she said that she had made up Leonardo's name³ and that G.A. was the father. G.A. admitted paternity. Norma's estranged husband, Jose Z., said he was not the father.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

² Rule references are to the California Rules of Court.

³ It later turned out that Edgar's full name is Edgar Leonardo J. V.

At the October 11, 2006, detention hearing, the court deleted Jose's name from the petition, added G.A.'s name, and granted G.A.'s request for paternity testing. On December 12 the court reviewed the test results, found that G.A. was not the biological father, and deleted his name from the petition. That day, Norma completed a new San Diego Juvenile Court parentage inquiry form stating that Edgar was the father and listing his home telephone number. She also listed the telephone number of maternal grandmother Ester Z. as a contact number for Edgar. Norma's counsel stated that Edgar was a friend of the family, Norma could advise him of the next court date, and Ester had additional contact information. Counsel provided Edgar's mailing address, a post office box in Valley Center. The court added Edgar's information to the petition, ordered the court clerk to serve him by mail with a copy of the petition, ordered the Agency to search for Edgar, and set a hearing for January 3, 2007. On December 13, 2006, the clerk sent a copy of the petition to Edgar by certified mail. On December 14 the clerk sent him a copy of the December 12 minute order.

On January 3, 2007, the court entered a true finding on the petition and set hearings for January 31 and February 8. On January 5 the court clerk mailed a copy of the January 3 minute order to Edgar. On January 31 the court confirmed the February 8 hearing date. On February 8 the clerk mailed a copy of the January 31 minute order to Edgar and the court ordered that Christian be placed with relatives and set a six-month review hearing for June 5. On February 16 the clerk sent a copy of the February 8 minute order to Edgar.

On May 2, 2007, Norma told the Agency there was another possible father but refused to give his name. On May 15 the Agency sent a copy of the dependency petition and a "letter of parent notification" to Edgar by certified mail. On June 5 the court set a contested review hearing for July 13. On June 8 the court clerk sent a copy of the minute order to Edgar.

On July 13, 2007, the Agency's counsel told the court that the letter sent to Edgar had been returned with a notation that it could not be delivered or forwarded. The court found there had been reasonable notification efforts and set a section 366.26 hearing for November 8. The court clerk sent Edgar a writ packet on July 13 and a copy of the July 13 minute order on July 17.

On July 31, 2007, the Agency initiated an ultimately unsuccessful computer search for Edgar. On August 2 Ester advised the social worker that Edgar lived in Valley Center and contacted her occasionally, although she did not have his address or telephone number. On August 14 the social worker began leaving messages for Edgar at the telephone number listed in Norma's parentage inquiry. On October 16 Ester told a social worker that Edgar knew he was the biological father and visited Christian on weekends. The social worker told Ester to give Edgar the social worker's contact information.

Edgar first appeared in court on November 8, 2007. At the hearing he was served with a notice of the section 366.26 hearing which the court continued to January 14, 2008. At Edgar's request, the court set a paternity hearing for November 26, 2007. On November 14 Edgar left a message for the social worker but did not leave his telephone number. On November 26 Edgar filed a San Diego Juvenile Court parentage inquiry

form listing his address as Ester's home on Mactan Road in Valley Center. As his telephone number, he listed Ester's number. The court granted his request for paternity testing and set a paternity hearing to coincide with the section 366.26 hearing.

On January 14, 2008, the court found that Edgar was Christian's biological father, entered a paternity judgment, made notice findings, ordered that any section 388 petitions be filed by January 25 for a January 31 hearing, and set a contested section 366.26 hearing for February 7. On January 29 the court continued the section 366.26 hearing to February 19. On January 31 the court said it would consider a late section 388 petition but would grant no further continuances.

On February 19, 2008, Edgar filed his first section 388 petition. The court set an initial hearing for March 6 with the section 366.26 hearing trailing. After the February 19 hearing, Edgar told the social worker that he lived at a Stargaze Lane address in Valley Center and he had learned approximately five months earlier that Christian might be his child. Ester told the social worker that her contact with Edgar increased when he began receiving letters from the Agency. On March 4 Edgar told the social worker that he lived in Sinaloa, Mexico. On March 6 the court summarily denied Edgar's petition and continued the section 366.26 hearing to April 24. On April 22 Edgar repeated that he lived on Stargaze Lane. The social worker went there. The person who answered the door said that he had lived there since September 2007, he had recently received mail addressed to Edgar, and Edgar did not live there. On April 24 the court continued the section 366.26 hearing to April 25.

On April 25, 2008, Edgar filed his second section 388 petition. The court denied the petition and terminated parental rights.

NOTICE AND THE SECTION 388 PETITIONS

Section 388 allows the juvenile court to modify an order if a parent establishes, by a preponderance of the evidence, that new evidence or changed circumstances exist and the proposed change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing of those two elements. (*In re Zachary G., supra*, at p. 806; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of granting a hearing, but "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G., supra*, at p. 806.) We review the summary denial of a section 388 petition (*In re Zachary G., supra*, at p. 808; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431, 433) and a denial on the merits (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415) for abuse of discretion.

Edgar's first section 388 petition sought modification of all orders beginning with the detention order, claiming they were made without notice to him. As changed circumstances, the petition alleged that Norma had withheld his name, another man was named as the father, and Edgar's paternity was established in January 2008. The petition asked the court to set aside all findings, order reunification services for Edgar, and place

Christian with him. The petition alleged this would be in Christian's best interests because Edgar had visited him, loved him, and wanted to parent him.

Edgar's second section 388 petition sought modification of the same orders. As changed circumstances, the petition alleged that Edgar had visited Christian for at least six months and parented him during the lengthy visits, they had a loving relationship, Christian was happy to see him, affectionate, attached, and often cried when visits ended, and Edgar lived at the Stargaze Lane address with relatives who would help care for Christian. The petition asked the court to place Christian with Edgar or order transitional services. The petition alleged this would be in Christian's best interests because he recognized Edgar as his father, they loved each other and were bonded, and Edgar could provide a loving and stable home.

In summarily denying the first section 388 petition in March 2008, the court noted there had been due diligence to discover Edgar's address and the dependency petition and minute orders were sent to that address, Ester's post office box. The court concluded there was no change of circumstance but said it would entertain another section 388 petition if Edgar had information that the notice efforts were insufficient. In denying the second section 388 petition seven weeks later, the court found that no one had actively concealed Edgar's paternity and his paternity was ascertained by a systematic legal approach. The court determined that Edgar's regular, consistent, loving, and appropriate contact with Christian and the supportive extended family constituted changes in circumstance since the first section 388 petition. It concluded, however, that

reunification services were not in Christian's best interests because his contact with Edgar was limited and recent, Christian was very young, and he was entitled to permanence.

The court did not abuse its discretion by denying the section 388 petitions. The first petition was premised on Norma's alleged withholding of Edgar's name and his lack of notice of the proceedings. These allegations were addressed on the merits at the hearing on the second petition and properly rejected, as discussed below. Thus, the summary denial of the first petition is moot. (*In re Albert G.* (2003) 113 Cal.App.4th 132, 134.)

Edgar had unprotected sex with Norma and knew she was pregnant. Although he claimed she told him he was not the father, he took her to the hospital when she was ready to deliver and was with her when Christian was born. As soon as Edgar's name came to light just two months after the dependency petition was filed, he was served with a copy of the petition and minute order at the post office box—the address to which further notices were sent and which he later listed on his notice of appeal. He remained in contact with Ester and Norma and received mail sent to the post office box.⁴ As early as December 6, 2006, he began receiving documents from the court informing him of the dependency proceedings. He admitted knowing by September 2007 that he might be Christian's father. Nevertheless, he did not appear in court until November 2007. Approximately two weeks later, he supplied a new address—Ester's home on Mactan

⁴ Although the Agency's counsel said in July 2007 that the notification letter sent to the post office box in May was returned, there is no indication that any other mailing was not delivered.

Road—and listed his telephone number as Ester's, the same number Norma had supplied nearly a year earlier. Edgar did not file his first section 388 petition until more than two months after his first appearance, and over a year after the court sent Edgar the dependency petition. The day he filed that petition, he gave the Agency the Stargaze Lane address, also listed on his notice of appeal. Two months later, he said he had lived on Stargaze Lane for about seven months, but when the social worker went to that address he was told that Edgar did not live there.

Due process requires notice that is reasonably calculated to apprise a parent of the dependency proceedings and allow him an opportunity to object. (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 188.) "[T]here is no due process violation when there has been a good faith attempt to provide notice to a parent who is transient and whose whereabouts are unknown for the majority of the proceedings." (*Ibid.*) "Once a parent has been located, it becomes the obligation of the parent to communicate with the [Agency]" (*In re Raymond R.* (1994) 26 Cal.App.4th 436, 441.)

Section 316.2, subdivision (b) and rule 5.635(g) require that Judicial Council form JV-505, Paternity-Waiver of Rights, be sent by certified mail return receipt requested to an alleged father's "last and usual place of abode." Edgar asserts he was denied due process because he was not sent this form in a timely manner and was thus unable to establish paternity and obtain reunification services at the outset of the case. Neither one of his section 388 petitions mentioned this issue. While the form is mandatory, any error was harmless. For nearly a year Edgar ignored the many mailings he received regarding this case. Under these circumstances, it does not appear that one additional mailing

would have prompted him to come forward earlier. After he finally appeared, the court immediately granted his request for a paternity test. The test was conducted less than four weeks later, the results filed within nine days, and the paternity judgment entered one month after that. There was no due process violation.

The court properly rejected lack of notice as a change of circumstance and properly determined that Edgar's proposed modifications—reunification services and placement—were not in Christian's best interests. Christian had lived with his relative caregivers for 18 months, since early infancy. The focus was on his need for permanency and stability (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317, 324) which his relative caregivers were ready, willing, and able to provide through adoption. The court did not abuse its discretion by concluding that granting the second section 388 petition would not be in Christian's best interests.

THE BENEFICIAL RELATIONSHIP EXCEPTION

Section 366.26, subdivision (c)(1) allows termination of parental rights upon clear and convincing evidence of adoptability. An exception exists if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The existence of this relationship is determined by "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the

child's particular needs. . . ." (*Id.* at p. 576.) Examining the evidence in the light most favorable to the judgment, we conclude that while Edgar maintained regular visitation and contact with Christian in the several months before the section 366.26 hearing, he failed to meet his burden of showing a beneficial relationship. (*In re Autumn H.*, *supra*, at pp. 576-577; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)

At the time of the section 366.26 hearing, Christian was 18 months old. He had lived with his relative caregivers since he was two months old. He had never been in Edgar's custody and was bonded to his caregivers. While the interaction between Edgar and Christian was positive, Christian also interacted positively with the social worker and exhibited no anxiety when separated from Edgar. He needed the safety, stability, and permanence his caregivers offered him.

Edgar relies on *In re S.B.* (2008) 164 Cal.App.4th 289, in which this court concluded the juvenile court erred by declining to apply the beneficial relationship exception. (*Id.* at p. 301.) That case is distinguishable. There, the child was five years old (*id.* at pp. 293, 295), the appellant father had been her primary caretaker for three years, she continued to display a strong attachment to him after her removal (*id.* at pp. 299-301), and they "had an emotionally significant relationship." (*Id.* at p. 298.) These factors were not present here. The court did not err by declining to apply the exception.

ICWA

Edgar contends the court failed to comply with ICWA because it did not inquire into his Indian heritage or order him to complete a Judicial Council Form, Parental Notification of Indian Status (formerly, JV-130 pursuant to rule 5.664(d); now, ICWA-

020 pursuant to rule 5.481(a)(2)), and did not order the Agency to complete Judicial Council Forms, form ICWA-010(A) [Indian Child Inquiry Attachment] (rule 5.481(a)(1)). These forms and the inquiry they include were mandatory and we urge the juvenile court to comply strictly with ICWA requirements. Here, however, omission of the forms was harmless under any standard. In November 2007 Edgar completed a San Diego Juvenile Court parentage inquiry form, declaring under penalty of perjury that he had no Indian heritage. In her December 2006 parentage inquiry, Norma denied that Edgar had any American Indian heritage.⁵ We would expect that if there were any evidence suggesting Christian might have Indian heritage, experienced dependency counsel would bring it to our attention. Because there is no indication of such heritage, we reject Edgar's ICWA contention.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.

⁵ Norma also denied that she had any such heritage.